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## AN EDITORIAL

One of the most promising developments of the year now drawing to a close was the extension of principles of arbitration and impartial determination to the problem of preserving democratic rights of labor union members and of providing remedies against irresponsible or unethical conduct on the part of unions, with respect to either members or the public. Several examples come to mind, but we refer particularly to the action taken at the 16th Annual Convention of the United Automobile Workers Union, AFL-CIO in April 1957 in setting up an appeal board of independent distinguished citizens to which members of the organization could appeal their grievances against union officers. The board was also empowered to act, on its own motion, as a censor of the union's moral conduct. Members of this board are: Rabbi Morris Adler, of Detroit, Chairman; Msgr. George G. Higgins, Director of the National Catholic Welfare Conference; Dr. Clark Kerr, President of the University of California and an AAA Director; Dr. Edwin Witte, Professor at the University of Wisconsin; Judge Wade H. McCree of the Michigan Circuit Court; Bishop G. Bromley Oxnam, Methodist Bishop of Washington; and Magistrate J. Arthur Hanrahan of Windsor, Ontario.

This procedure was not established in response to recent disclosures of malpractices on the part of certain unions. On the contrary, the plan had been under consideration for several years, thought of originally merely as part of the appeal procedure of the union's internal trial machinery. In view of public concern over ethical conduct on the part of unions this year, however, the project was expanded "to cover the broad area of moral and ethical standards." The significance of this development is not in the number of appeals expected to come before the review board —a somewhat similar system in the Upholsterers Union set up some time ago produced only one case in three years. The significance lies, rather, in the recognition that although labor unions are private organizations, entitled to formulate their own rules,

they are private organizations whose manner of functioning deeply affects the public interest. The significance of the pioneering action of the UAW lies in the recognition that, in the last analysis, preservation of unions as private organizations, free of governmental controls, depends upon ability of the organizations to voluntarily "police their own areas" and to conduct themselves with due regard for the public interest.

Once again, arbitration—final and binding determinations by impartial persons—is demonstrating its usefulness as one of the safeguards of "due process" and democratic life.

## AMONG OUR CONTRIBUTORS

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# LABOR ARBITRATION IN STATE COURTS*

by William J. Isaacson

With the U. S. Supreme Court's decision in *Textile Workers Union of America v. Lincoln Mills of Alabama,*[1] state arbitration law as applied to collective bargaining agreements takes on new significance. Now, even if state substantive law is to be superseded by federal substantive law wherever interestate commerce is affected (inasmuch as there is no developed body of federal substantive law on arbitration), federal courts, giving expression to "judicial inventiveness" as directed by Justice Douglas, will look, among other places, to state court decisions for guidance. A well reasoned state court opinion may, by absorption into the federal law, become the uniform rule applicable in every state. With this in mind, we turn to an examination of the state court decisions in the past year.

## AGREEMENT TO ARBITRATE

A state court decision of major interest in the past year was that of Chancellor Inzer of the Monroe County, Mississippi, Chancery Court, *Prairie Local Lodge No. 1538 v. Machine Products Co.*[2] He held that the commmon law rule developed in commercial arbitration that executory arbitration agreements are unenforceable does not apply to the arbitration provisions of collective bargaining agreements. Foreshadowing the majority opinion in *Lincoln Mills,* he held:

> "It would not be a consistent position for the courts of this State to say that we think collective bargaining contracts are in the interest of public welfare and that our courts are open to both the company and the union to require obedience and performance of such contracts, but if in the interpretation of contract or dispute arising under the

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* This article, written with the assistance of Herbert Semmel, Esq., surveys all court decisions reported in Volumes 26 and 27 and Volume 28 through page 470 of the BNA Labor Arbitration Reports. A total of 125 court decisions were reported, of which 77 were New York cases and 25 were federal court decisions, leaving but 23 court cases reported from the 47 other states.

1. 353 U.S. 448 (June 3, 1957).
2. 27 LA 285.

contract you agree to arbitrate these things, the Court will not require you to do so because you have the right to revoke such an agreement at any time before the award is made. Such a position would not be sound. If such contracts are to be enforced at all by the Courts, it appears to this Court that it is most important to management and labor that an agreement to arbitrate should be enforced."

The Mississippi Supreme Court, however, reversed, holding that the policy considerations relied upon in the court below could be considered only by the legislature.[3] It was thus again made clear that only through legislation would arbitration agreements become enforceable under state law.

In a significant decision, the New York Court of Appeals held that a strike in violation of a no-strike clause does not abrogate the collective bargaining agreement and, accordingly, the union still has a right to compel arbitration of contract grievances.[4] Moreover, it has also been held in New York that the obligation to arbitrate extends to the question of damages for a strike in breach of contract.[5] In other jurisdictions, however, damages arising from a breach of a no-strike clause have been held not to be arbitrable on the theory that the arbitration clause was designed to eliminate strikes, not to settle disputes arising out of strikes.[6]

A California case raised the question as to whether a party to an arbitration agreement who resorts to an alternate remedy provided under state law loses his right to arbitrate.[7] In a dispute between an employer and a group of unions over dismissal pay, all but one union agreed to arbitrate as provided in their collective bargaining agreements. The dissenter, Local 659, filed a criminal complaint, charging the employer with failure to pay wages. After the other unions were successful in the arbitration, however, Local 659 demanded arbitration, and, upon the employer's refusal, moved to compel arbitration. The District Court of Appeals upheld the denial

3. 94 So. 2d 344, 28 LA 339.
4. 2 N.Y. 2d 553, 161 N.Y.S. 2d 609, 28 LA 345 (1957). See also In re Epicure Diners, Inc., 26 LA 465 (N.Y. Sup. 1956); In re Furriers Joint Council, N.Y.L.J., Sept. 18, 1957, p. 5, 28 LA 63 (N.Y. Sup. Ct. 1957).
5. Regent Quality Furniture, Inc. v. Pollock, N.Y.L.J., April 16, 1956, p. 7, 26 LA 302 (N.Y. Sup. Ct. 1956).
6. UAW v. Benton Harbor Malleable Industries, 242 F. 2d 536, 39 LRRM 2689 (6th Cir. 1957; certiorari denied 26 U.S. Law Week 3116 (October 7, 1957).
7. Local 659 IATSE v. Color Corp. of America, 298 P. 2d 128, 26 LA 703 (Calif. Dist. Ct. App. 1956).

of the motion, and the decision was affirmed by the California Supreme Court,[8] on the ground that the union's entire course of conduct, of which pursuance of the remedy provided under the Labor Code was some evidence, indicated a repudiation of the agreement to arbitrate. This repudiation, the court continued, upon acceptance by the employer, rescinds the agreement. The court did not rule specifically upon the argument of the State Labor Commissioner, who intervened as *amicus curiae* and urged that it would be against public policy to declare that resort to criminal complaint under the Labor Code constitutes an election of remedies.

Three cases dealt with the right of an employer to repudiate the arbitration provisions of a collective bargaining agreement on the ground that the union was not the majority representative at the time the agreement was signed or the arbitration demanded.[9] Two of these, New York cases, continue to hold that the agreement has a presumption of legality which may only be rebutted through appropriate proceedings before the state or federal labor boards. In a New Jersey case, the court ordered arbitration of the union's claim for employer payment to the union welfare funds, holding that it is a question of contract interpretation whether the repudiation of the union ended the employer's obligation to make payments into the welfare fund. But it conditionally denied an order to compel arbitration to recover the wages allegedly due employees who had repudiated the union and the collective bargaining agreement. It remanded the case to the trial court to determine whether the employees affected wished to press their claims, and if they did, whether they had previously waived them by agreement with the employer.

In another decision, the New York Court of Appeals held, by a 4-3 vote, that an oral arbitration agreement followed by a letter merely stating the issue to be arbitrated did not satisfy the requirement of the New York statute that arbitration agreements be in writing.[10] A California decision held that a provision in a collective bargaining agreement providing that if a grievance were not settled "it may be referred to arbitration" did not create an agreement to arbitrate, but nevertheless, a party will be barred from suing on the

8. 27 LA 391.
9. Red Seal Foot Fashions, Inc. v. Retail, Wholesale & Department Store Union, 152 N.Y.S. 2d 177, 26 LA 169, aff'd 153 N.Y.S. 2d 535 (1956); A. B. Wyatt Mfg. Co., 26 LA 171 (N.Y. Sup. Ct. 1956); Milk Drivers & Dairy Employees v. Cream-O-Land, 120 A. 2d 640, 39 N.J. Super. 163 (App. Div. 1956).
10. In re Writers Guild of America, East, 1 N.Y. 2d 305, 152 N.Y.S. 2d 466, 26 LA 901 (1956).

collective bargaining agreement if it has not first offered to arbitrate.[11]

## ARBITRABLE ISSUE

The problem of arbitrability continues to be one of the most perplexing questions before the courts. The court decisions continue to turn up conflicting rulings on basically similar questions. These conflicts may be traced to the general application of the *Cutler-Hammer* doctrine that "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration".[12] The inherent difficulty in applying this doctrine is apparent, as "reasonable men" and "reasonable judges" will often differ as to whether the meaning of any provision is "in dispute", particularly in the context of the continuing collective bargaining relation where custom and past practice are of great significance.

A New Jersey decision applying the *Cutler-Hammer* doctrine held that claims for vacation pay payable after the collective bargaining agreement had terminated were not arbitrable.[13] Despite the fact that an eminent arbitrator had already ruled in favor of arbitrability because the right to vacation pay accrues throughout the vacation year,[14] the court held:

> "It is beyond dispute that the parties intended that vacation benefits should be paid only during the life of the contract."

But in a New York case involving a similar question with respect to dismissal and severance pay, the Court of Appeals by a 4-3 decision ruled in favor of arbitrability. The majority opinion, liberalizing the *Cutler-Hammer* rule, held:

> ". . . the issue is not whether petitioner is right, but whether it is entitled to have the issues determined in the forum designated in the agreement."[15]

Conflicting decisions were also rendered on the right of the union to arbitrate disputes arising out of sub-contracting of work, when the contract was silent on the subject. A Michigan case, tak-

11. Williams v. Pacific Electric Railway Co., 27 LA 754 (Dist. Ct. of App. 1956).
12. 271 App. Div. 917, 67 N.Y.S. 2d 317, aff'd 297 N.Y. 519, 74 N.E. 2d 464 (1947).
13. Botany Mills, Inc. v. Textile Workers Union of America, 42 N.J. Super. 327, 27 LA 165 (N.J. Super. Ct. 1957) (temporary stay of arbitration), 28 LA 315 (1957) (permanent stay).
14. 27 LA 1.
15. In re Potoker, 2 N.Y. 2d 553, 161 N.Y.S. 2d 609, 28 LA 345 (1957). Compare A. Berlin & Sons, Inc., N.Y.L.J., February 24, 1956, p. 7, 26 LA 54 (N.Y. Sup. Ct. 1956).

ing the approach that a collective bargaining agreement restricts management rights only to the extent specifically provided, held a sub-contracting grievance to be non-arbitrable.[16] In a similar case, however, a New York court held that sub-contracting affects the question of the work to be done by regular employees,[17] and hence the grievance is arbitrable.

The New Jersey Supreme Court in *Newark Publishers Association v. Newark Typographical Union*,[18] held a dispute as to the manning of new machinery was arbitrable even though the agreement merely provided that such questions "should be negotiated". In an analogous case,[19] however, the United States Court of Appeals, Second Circuit, applying New York law under diversity jurisdiction, held that changes which could be made only "after consultation with the Union" were not arbitrable.

A simple method for parties to avoid the often undesirable interference of the courts in the arbitration process was suggested by an opinion of the Sixth Circuit Court of Appeals. In a suit brought under Section 301, the Court acknowledged the right of the parties to remove the question of arbitrability from the courts to the arbitrator by clearly providing that all questions, including questions of arbitrability, were to be decided by the arbitrator.[20]

The time when the issue of arbitrability may be raised before the courts was also the subject of several decisions this past year. In the leading case, the Massachusetts Supreme Judicial Court held that a pending arbitration hearing should not be enjoined because of a dispute as to arbitrability.[21] "We see no irreparable injury in first, as promised, carrying out arbitration before the initial tribunal contemplated in the agreement."

On the other hand, the Sixth Circuit Court of Appeals took the opposite view and held that the question of arbitrability must be decided prior to the arbitration.[22]

16. United Dairy Workers v. Detroit Creamery Co., 26 LA 677 (Mich. Cir. Ct. 1956).
17. In re Max Mandel Laces, Inc., N.Y.L.J., Nov. 13, 1956, p. 7, 27 LA 440 (N.Y. Sup. Ct. 1956).
18. 27 LA 396 (1956).
19. Davenport v. Proctor & Gamble Mfg. Co., 27 LA 821 (1957).
20. UAW v. Benton Harbor Malleable Industries, *supra* n. 6. See also O'Malley v. Petroleum Maintenance Co., 143 A.C.A. 323, 26 LA 861 (Calif. Dist. Ct. of App. 1956), rev'd 299 P. 2d 1051, 28 LA 155 (Calif. Sup. Ct. 1957).
21. Post Publishing Co. v. Cort, 1956 A.S. 641 (Mass.), 38 LRRM 2198 (1956).
22. UAW v. Benton Harbor Malleable Industries, *supra*, n. 20. The Sixth Circuit Court further held that a stay of suit pending arbitration cannot

## THE AWARD

The relationship between the arbitrator's award and the opinion accompanying it was the subject of several decisions in the past year. The Connecticut Supreme Court of Errors raised, but did not decide, the question of whether the standard rule—"that an award need contain no more than the actual decision of the arbitrators and that the means by which they reach the award, unless the submission requires otherwise, is needless and superfluous"—should continue to be applied.[23] A Pennsylvania court, however, vacated an award valid on its face because the accompanying opinion indicated it was not made on the subject matter submitted.[24] The court noted that had the opinion been omitted, the award would have been confirmed.[25]

A New York decision suggested a test to be applied to an award attacked for lack of definiteness.[26] Upholding an award providing for continuance of work "in the manner which it was done in the past" and allowing salesmen to carry "a reasonable number of pocketbooks", the court said:

> "The law is clear that an agreement is not too indefinite if it can be made certain by reference to outside matter . . . An arbitrator's award . . . need not . . . be more precise, detailed and meticulous than the collective agreement itself . . . The courts might well make that principle the test of the appropriateness of the award under the contract."

An intermediate appellate New York court, however, apparently did not choose to follow the suggested test of the *Rockaway News* case and proceeded to set aside an award granting back pay to three unnamed persons who were merely described as union personnel selected as replacements for non-union personnel.[27]

## THE INDIVIDUAL EMPLOYEE IN ARBITRATION

An increasing number of decisions in the past year have dealt

issue until the defendant has filed its answer. The court reasoned that if the answer admits all liability, no arbitrable issue is presented. This reasoning, however, ignores the fact that the role of the arbitrator not only extends to adjudicating liability but to fashioning appropriate remedies.

23. New Britain Machine Co. v. Lodge 1021, IAM, 26 LA 461 (1956).
24. In re Acro Supply Mfg. Co., 27 LA 328 (Pa. Common Pleas, 1956).
25. Compare Fay v. Burndy Engineering Co., N.Y.L.J., March 29, 1956, p. 8, 26 LA 201 (N.Y. Sup. Ct. 1956).
26. Feldman v. Rockaway News Supply, 6 Misc. 2d 406, 27 LA 596 (N.Y. Sup. Ct. 1956).
27. Kyne v. Molfetas, 3 A.D. 2d 384, 160 N.Y.S. 2d 605 (App. Div. 1st Dept. 1957).

with the problem of the role of the individual employee in the arbitration process.[28] The law on the subject, as a number of judges have observed, is still in a state of flux. But the prevailing consideration seems to be that expressed in a New York decision which held that to permit an individual employee to assume a position in the arbitration process contrary to that of his collective bargaining representative "would create an unstable and chaotic condition not conducive to industrial harmony".[29]

When an employee raises a grievance, it will first normally be taken up at the shop level, and, if no agreement is reached, at successively higher levels of respective union and management hierarchy. The purpose of this grievance procedure is to reach a settlement of the grievance on the basis of mutual agreement (generally, union-management agreement) without resort either to arbitration or litigation. But there are occasions when there is individual employee dissatisfaction with the procedure. When this occurs, questions arise.

*First,* what recourse, if any, has the individual employee where he is dissatisfied with the settlement?

(a) If he brings a suit to compel arbitration against either the union or the employer, or against both, recent decisions indicate that he will be unsuccessful.[30] The decisions generally rely on the reasoning that the right to compel arbitration arises solely from the agreement to arbitrate and may be enforced only by the contractual parties, the union and the employer.[31] Reliance on contract principles does not, however, serve as an adequate answer where the employee sues the union to compel initiation of an arbitration. *Doyle v. Lasorda* was such a case.[32] But the opinion did not adequately explain the denial of the employee's action. It apparently rested on the principle expressed in the *Macy* case and in other decisions,[33] that

28. The subject matter has been discussed at length from divergent points of view in two excellent articles: Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Lenhoff, The Effect of Labor Arbitration Clauses Upon the Individual, 9 Arb. J. 3 (1954).
29. Cox v. R. H. Macy & Co., 26 LA 243 (N.Y. Sup. Ct. 1956).
30. Cox v. R. H. Macy & Co., 152 N.Y.S. 2d 858, 26 LA 242 (N.Y. Sup. Ct. 1956); Doyle v. Lasorda, N.Y.L.J. May 3, 1956, p. 7, 26 LA 464, rearg. den. N.Y.L.J. May 28, 1956, p. 7, 26 LA 556 (N.Y. Sup. Ct. 1956); Curet v. Landriscina, N.Y.L.J. May 31, 1956, p. 9, 26 LA 582 (N.Y. Sup. Ct. 1956); Terrell v. Local Lodge 758, IAM, 28 LA 418 (Cal. Dist. Ct. App. 1957).
31. See Lenhoff, 9 Arb. J. at pp. 4-8.
32. Doyle v. Lasorda, *supra* n. 30.
33. E.g., Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S. 2d 709, 22 LA 56 (N.Y. App. Div. 1954); Bianculli v. Brooklyn Union Gas Co., 115 N.Y.S. 2d 715, 19 LA 83 (1952).

the union controls the enforcement of the employer's obligations with respect to matters arising under the collective bargaining agreement.

(b) Secondly, if the employee cannot compel arbitration, may he sue the employer, or the union, or both, for damages for loss of his asserted right under the collective bargaining agreement? Where the right alleged, as it generally must be, arises out of the collective agreement, most courts continue to hold that the suit is barred by the arbitration provision. The rights under the agreement must be asserted under the remedies provided by the agreement. The leading case in the past year was that of the Tennessee Supreme Court which sustained a demurrer to an employee's complaint seeking damages from the employer for violation of the seniority provisions of a collective bargaining agreement.[34] The court, however, declined to rule as to whether the suit would have been barred had the union expressly declined to arbitrate. A California District Court of Appeals, in just such a case, where both employer and union were defendants, held the suit was barred.[35]

> "The union as heretofore pointed out, as the representative of appellant, exercised its discretion in this case and elected not to proceed to arbitration under the step four procedure. It therefore failed to exhaust the grievance procedure which is, by the contract, the exclusive method for adjusting claims or disputes of an employee . . ."

On the union's motion for summary judgment the court stated:

> "In the absence of an agreement, a union member does not have a cause of action against the union for its failure to process his grievance to arbitration."

Finding no such agreement in the union's constitution, by-laws or membership applications, the union's motion was also granted.[36]

Still other questions may arise where, in the absence of a settlement of the grievance, the union and the employer arbitrate. In most cases, unless the numbers are large, the affected employees may be present at the arbitration. Normally, the employees are satisfied to

34. Jenkins v. Atlas Powder Co., 27 LA 779 (Tenn. 1956).
35. Terrell v. Local Lodge 758, IAM, 141 Cal. App. 2d 17, 296 P. 2d 100, 26 LA 579.
36. 28 LA 419. *Accord*: Di Rienzo v. Farrand Optical Co., 148 N.Y.S. 2d 587, 26 LA 375 (N.Y. Mun. Ct. 1956). In re Wall Street Club, Inc., 27 LA 633 (N. Y. Sup. Ct. 1956); Spilkewitz v. Pepper, 159 N. Y. S. 2d 53, 27 LA 715 (N. Y. Sup. Ct. 1957).
*Contra*: Trimarchi v. Sheffield Farms, Inc., N. Y. L. J. July 16, 1956, p. 3, 26 LA 741 (N. Y. Sup. Ct. 1956); Donnelly v. United Fruit Co., N. Y. L. J. Feb. 27, 1957, p. 7, 28 LA 64 (N. Y. Sup. Ct. 1957).

have the union present the case.

But under certain circumstances an employee may wish to take a position contrary to the union. The employee may be asserting a contract interpretation granting him greater pay or seniority but to the disadvantage of other employees of similar rights, and the union may be intending to take a position favoring the other employees or a position somewhere between the two points of view.[37] Or, because of personal or political animosities, an employee may feel he will not be adequately represented.

Permitting individual employees to participate as separate parties in arbitration proceedings presents a real danger of creating chaos at the hearing and destroying the informal nature of grievance arbitration. If one employee may intervene, may not all affected employees do so? A procedure designed to result in a speedy solution to a problem may be converted into a lengthy formalized hearing involving numerous parties, each with his particular point of view. The terminal point of the collective process would become a forum for individual expression and divisive dispute.

Nevertheless, several New York decisions in the last year have supported the right of an employee to intervene in the arbitration process, and, in one case, a motion to intervene was granted.[38] It has also been held that if the employee has a right to intervene, he may move to modify or vacate an award,[39] or to enforce an award.[40]

To date one aspect of the problem of individual rights has been largely ignored by both litigating attorneys and the courts, namely, the effect of the proviso to Section 9 of the National Labor Relations Act and the decision of the Supreme Court in *Elgin, Joliet & Eastern Railway Co. v. Burley*.[41] The proviso to Section 9 reads:

> "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the

37. An interesting example of a situation in which an employee might urge a contract interpretation giving him eight times his regular pay for extra-dangerous overtime work on a holiday and how this conflicts with the overall group interest, is offered by Professor Cox in Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 606-11 (1956).
38. In re Iroquois Beverage Corp., 159 N.Y.S. 2d 256 (N.Y. Sup. Ct. 1957). *Accord in dicta*, Trimarchi v. Sheffield Farms, Inc., N.Y.L.J. July 16, 1956, p. 3, 26 LA 741 (N.Y. Sup. Ct. 1956); Doyle v. Lasorda, *supra* n. 30; Soto v. Lenscraft Optical Corp., 28 LA 279 (N.Y. Sup. Ct. 1957). These cases rely on a dicta in Donato v. American Locomotive Co., *supra* n. 33.
39. Soto v. Lenscraft Optical Corp., *supra* n. 38.
40. Lammonds v. Aleo Mfg. Co., 26 LA 351 (N. Car. Sup. Ct. 1956).
41. 325 U.S. 711 (1945), aff'd on reargument, 327 U.S. 661 (1946).

intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment."

Although the cases are silent, commentators have raised the question of the proviso's application. Professor Lenhoff argues that the proviso creates a substantive right of employees to settle their own grievances directly with their employer, a right which cannot be taken away by agreement between the union and the employer.[42] Under this view, grievance settlements and arbitration awards entered into without the consent or participation of an affected employee would be subject to collateral attack. Professor Cox, on the other hand, finds that the proviso created no rights in the individual employee but was only intended to make clear that the employer was not guilty of a refusal to bargain if he dealt with the individual. He concludes that the Labor Act still permits the parties to agree that all grievances be handled exclusively by the union.[43]

In the *Elgin* case, the Supreme Court held that the statutory bargaining agent under the Railway Labor Act may not make binding settlements of an employee's grivances without his consent and an award of the National Railroad Adjustment Board in which the individual employee did not participate or was not represented is not binding on the employee. While the language in the Supreme Court decision in *Elgin* may be invoked in support of the position that the proviso created a substantive right to settle one's own grievance, it is questionable whether the decision would be applied to a case arising under the National Labor Relations Act. The decision to a large extent turns on the unique history of railway labor legislation. Moreover, although the case was reaffirmed on reargument, the majority opinion renders the individual employee rights, in the words of Mr. Justice Frankfurter, "largely illusory because the Court now erects a series of hurdles which will be, and we assume were intended to be, almost impossible for an employee to clear".

The conflict which may arise between rights of individuals and group rights is illustrated by the decision of the Appellate Division, First Department, of the New York Supreme Court in *New York*

42. Lenhoff, 9 Arb. J. at 14-16.
43. Cox, 69 Harv. L. Rev. at 621-24.

*Times Co. v. Newspaper Guild of New York.*[44] On discharge of an employee, the grievance committee of *Times'* employees recommended that the discharge not be brought to arbitration. The recommendation was supported by a referendum among the *Times'* employees. The Newspaper Guild's Executive Board, however, voted to arbitrate. Thus a conflict was presented between the dischargee, to arbitrate his discharge and the majority of employees not to do so.

On cross motions to compel and to stay arbitration, the trial court granted a stay, holding that the collective bargaining agreement was entered into by the union "for itself and on behalf of all employees of the Times". Therefore, the union as agent was bound by the wishes of its principal, the *Times'* employees. On appeal, however, the Appellate Division reversed and ordered arbitration. It held that the common law rules of agency do not apply:

> "Once an agent has been designated for collective bargaining purposes, the members it represents cannot assume to reject certain acts of its bargaining representatives and accept others. To hold otherwise, would make a shambles of all labor negotiations and would be refutation of long experience in that field."[45]

If the employees are dissatisfied with the union's representation "there are statutory provisions for the revocation of the right of any union to represent employees in any given enterprise."

It is not intended in the present report to offer an answer to each of the several problems discussed above. An approach is suggested, however. The arbitration process should be administered by the employer and the collective bargaining agent of his employees free from interference of particular individuals asserting their individual interests. On the other hand, the rights of the employees should be protected against unfair or arbitrary union action through enforcement of the union's duty fairly to represent all members in the collective bargaining unit. Specifically, so long as the union properly exercises the authority vested in it as the collective bargaining agent, it should be free from claims of loss by any individual member. If, however, the union discriminates against an employee, because of his lack of union membership, because he is not a "good" union man, because of racial considerations, or even because of personal animosities unconnected with the employment relationship, the employee should have a remedy. He might sue in tort in the state

44. 2 A.D. 2d 31, 152 N.Y.S. 2d 884, 26 LA 607 (1956).
45. 26 LA at 608.

courts.[46] Or, as decisions of the Supreme Court[47] seem to indicate, he may receive injunctive relief in the federal courts if the union violates its duty of fair and equal representation under the NLRA.

Under this approach, the arbitration process is free of disruptive third party interference. The employer is free of involvement in a controversy between the union and its members, a controversy in which he has no proper interest. The employer is secure in the knowledge that grievances settled by agreement with the union are settled with finality and that an arbitrator's decision is not subject to collateral attack. On the union side, its basic interest in the arbitration process, the achievement of a uniform non-discriminatory interpretation and enforcement of the collective bargaining agreement most beneficial to all members of the bargaining unit is protected. As to the individual employee, his rights are protected under the traditional procedures in the courts and by statutory proceedings in labor relations tribunals under federal or state labor relations acts. Moreover, the individual always has the statutory right to attempt to obtain majority support for the removal of the bargaining agent.[48]

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46. See O'Brien v. Dade, 18 N.J. 457, 114 A. 2d 266 (1955); Donato v. American Locomotive Co., 111 N.Y.S. 2d 434, 279 App. Div. 545 (1952); Di Rienzo v. Farrand Optical Co., *supra*, n. 36. But see Terrell v. Local Lodge 758, IAM, *supra* n. 30.
47. See Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944); Tunstall v. Bro. Locomotive Firemen, 323 U.S. 2101 (1944); Syres v. Oil Workers Union, 350 U.S. 892, reversing per curiam, 223 F. 2d 739 (1955).
48. See dissenting opinions of Mr. Justice Frankfurter in Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711 (1945), reargument 327 U.S. 661 (1946).

# ARBITRATION IN CLOSE CORPORATIONS:
## A Study in Legislative Needs

by Forest H. O'Neal

This article points out deficiencies in arbitration statutes as they affect the arbitration of disputes in close corporations. Arbitration is now widely used in the settlement of intra-organization disputes in close corporations, but in many states outmoded statutes and unfavorable judicial interpretations of the statutes have rendered uncertain the effective enforcement of arrangements to arbitrate the very kinds of disputes which most often occur in that type of business organization.

A fatal defect of statutes in a number of jurisdictions, a defect which practically precludes the use of arbitration in close corporations in those jurisdictions, is the failure to provide for enforcement of agreements to arbitrate *future* disputes.[1] For arbitration to be serviceable in a close corporation, a binding arrangement must be made in advance by a shareholders' agreement or by a charter or by-law provision for the settlement of disputes which may thereafter arise. It is true that even in the absence of an advance arrangement the participants in an intra-corporate dispute will occasionally submit the dispute to arbitration; but by-and-large, arbitration cannot be an effective tool in resolving controversies in close corporations unless provision is made for its use before the controversies arise. After a dispute has arisen, the participant or faction in a position to outlast the opposition or to profit from a deadlock ordinarily will not submit the controversy to arbitration.

Narrow arbitration statutes, providing only for the submission of existing disputes to arbitration and not mentioning agreements to arbitrate future disputes, have had to be construed against a common law background exceedingly unfavorable to agreements to arbitrate

1. See, *e.g.*, Fla. Stat. §§ 57.01 *et seq.* (1951); Ill. Rev. Stat. c. 10, §§ 1 et seq. (1935); N.C. Gen. Stat. §§ 1-544-67 (1953); Wyo. Comp. Stat. Ann. §§ 3-5601-24 (1945).

future disputes.[2] At common law an agreement to arbitrate disputes thereafter occurring was revocable and could not be specifically enforced; until an award was made either party to the arbitration could terminate the arbitrators' power to act.[3] This unfavorable judicial reaction to agreements to arbitrate future disputes was grounded upon the supposition that arrangements of that kind "ousted the courts of their jurisdiction." The common law rules on agreements to arbitrate future disputes, the courts have generally held, are not altered by an arbitration statute which covers only agreements to arbitrate existing controversies.[4] As the states with statutes which fail to cover the arbitration of future disputes become more important commercially and as the need for commercial arbitration becomes greater, this deficiency in their arbitration statutes will be felt more acutely.

Even in some of the commercially important states, including New York, the arbitration statutes are ill-adapted to encourage and strengthen the use of arbitration in close corporations. The arbitration statutes in those jurisdictions, it is true, provide expressly for the enforcement of agreements to arbitrate future disputes. The New York statute,[5] for instance, declares in general terms that a contract to settle by arbitration controversies thereafter arising shall be "valid,

2. For a discussion of the dislike of the courts for arbitration agreements, see Lorenzen, Commercial Arbitration—International and Interstate Aspects, 43 Yale L.J. 716-19 (1934); Sayre, Development of Commercial Arbitration Law, 37 Yale L.J. 595, 598-605 (1928).
3. See Sturges, Commercial Arbitrations and Awards 45 (1930); O'Neal, Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration, 67 Harv. L. Rev. 786, 794 (1954). In discussing the failure of common law principles to meet the needs of an effective arbitration program, Pirsig, Some Comments on Arbitration Legislation and the Uniform Act, 10 Vand. L. Rev. 685 (1957), comments as follows: "Two particularly serious defects were the revocability of an agreement to arbitrate and the necessity of resort to a civil action to enforce the award. The first nullified the purpose of the parties entering into the agreement and the second did so in substantial part by forcing the successful party into expensive and time-consuming litigation."
4. See Sturges, Commercial Arbitrations and Awards 88 (1930).
5. N.Y. Civ. Prac. Act §§ 1448 et seq. Other arbitration statutes providing for the enforcement of agreements to arbitrate future disputes are the following: Cal. Code Civ. Proc. § 1280 (Deering 1953); Conn. Gen. Stat. § 8151 (1949); La. Rev. Stat. § 9:4201 (1950); Mass. Ann. Laws c. 151, § 14 (1956); Mich. Stat. Ann. § 27.2483 (1954); N. H. Rev. Stat. Ann. § 542:1 (1955); N.J. Stat. Ann. § 2A:24-1 (1952); Ohio Rev. Code Ann. § 2711.01 (Baldwin Supp. 1956); Ore. Rev. Stat. § 33.220 (1955); Pa. Stat. Ann. tit. 5, § 161 (1930); R. I. Gen. Laws Ann. c. 475, § 1 (1938); Wash. Rev. Code § 7.04.010 (1956); Wis. Stat. § 298.01 (1955). The Federal Arbitration Act, 61 Stat. 669 (1947), 9 U.S.C.A. § 2 (1953), also provides for the enforcement of such agreements.

enforceable and irrevocable," and provides specifically for direct enforcement of the agreement by a court order compelling arbitration, for a stay of an action or proceedings brought in violation of the agreement, and for the judicial appointment of arbitrators whenever a party fails or refuses to appoint arbitrators. The difficulty is that the New York statute and statutes in a number of other states provide for the arbitration only of disputes which would be justiciable in the courts. Thus the New York statute[6] refers to the arbitration of controversies "which may be the subject of an action" and the Massachusetts statute[7] to controversies "which might be the subject of a personal action at law or of a suit in equity." Restrictive language of this sort in an arbitration statute is an invitation to the courts to hold that the statute and its enforcement procedures are not applicable to undertakings to arbitrate management and policy questions, for example, questions such as the following: who are to be the corporation's directors and officers, what compensation is to be paid the principal officers, should a particular director be removed for misconduct, and should the corporation engage in a particular line of activity? Yet disputes on these matters are the very ones which may give rise to a deadlock or paralysis in a close corporation or to harmful strife among the participants.

The New York cases forcefully illustrate just how discouraging to the use of arbitration in close corporations is a statute which limits effective arbitration to justiciable controversies. As early as 1924, just four years after New York enacted the first statute for the effective enforcement of agreements to arbitrate future disputes, the Court of Appeals of New York in *Matter of Fletcher*[8] held that the statute did not apply to an agreement giving arbitrators power to determine the transfer price of corporate stock under an option arrangement. Further, the language and reasoning in the *Fletcher* case and in several subsequent New York decisions[9] suggested that agreements to arbitrate management and policy questions were not within the scope of the statute. Nevertheless, beginning about 1941, a number of lower court decisions in New York gave effect to agreements

6. N.Y. Civ. Prac. Act, § 1448.
7. Mass. Ann. Laws c. 251, 14 (1956).
8. 237 N.Y. 440, 143 N.E. 248 (1924).
9. Matter of Stern, 285 N.Y. 239, 33 N.E. 2d 689 (1941); Matter of Benedict (Limited Editions Club, Inc.), 265 App. Div. 518, 39 N.Y.S. 2d 852 (1st Dep't 1943).

to arbitrate management and policy questions in close corporations,[10] and something of a trend could be discerned in the New York decisions toward sustaining the use of arbitration in close corporations.

But alas, in 1956 the Court of Appeals of New York handed down another unfortunate decision in *Application of Burkin*.[11] In that case, two shareholders of the corporations there involved had entered into a shareholders' agreement requiring a unanimous pote for the transaction of any business in which the vote or consent of the shareholders was authorized or required. Further, the certificates of incorporation of those companies required unanimity. In view of these unanimity requirements, which obviously made it impossible for either shareholder to get sufficient votes to remove the other from the directorate, the minority shareholder instituted arbitration proceedings under an arbitration clause in the shareholders' agreement to remove the majority shareholder as a director on the basis of alleged misconduct. The Court of Appeals held that this controversy was not subject to arbitration, stating that a controversy is subject to arbitration only if it is one which "might be the subject of an action" as required by the Civil Practice Act.[12] As the shareholders had not acted to remove the director, there was no controversy which might be the subject of an action. In other words, while common law courts had held agreements to arbitrate future disputes unenforcible because they ousted the courts of jurisdiction, the Court of Appeals held the controversy here not subject to arbitration for exactly the opposite reason, namely, because the controversy was not justiciable in the courts.

If the Court of Appeals in the *Burkin* case had simply held that the parties to the agreement there did not intend for the arbitration clause to extend to removal of one of the parties from the director-

10. Matter of De Caro (D'Angelo), 261 App. Div. 975, 25 N.Y.S. 2d 849 (1941); Matter of Carl (Weissman), 263 App. Div. 887, 32 N.Y.S. 2d 410 (2d Dep't 1942); Martocci v. Martocci, 42 N.Y.S. 2d 222 (Sup. Ct.), *aff'd mem.*, 266 App. Div. 840, 43 N.Y.S. 2d 516 (1st Dep't 1943); Matter of Landersman (Selig), 280 App. Div. 963, 116 N.Y.S. 2d 495 (1st Dep't 1952). See also Matter of Myers (Leibel), 304 N.Y. 656, 107 N.E. 2d 512 (1952), affirming 279 App. Div. 984, 112 N.Y.S. 2d 489 (1st Dep't 1952).

11. 1 N.Y. 2d 570, 136 N.E. 2d 862 (1956), *reversing*, 286 App. Div. 740, 147 N.Y.S. 2d 2 (1st Dep't 1955). The Appellate Division decision is noted in 69 Harv. L. Rev. 1323 (1956). See also Note, 30 St. John's L. Rev. 262 (1956).

12. The pertinent portions of N.Y. Civ. Prac. Act § 1448 read as follows: "Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy

ate,[13] the decision would not have been objectionable. The opinion indicates, however, that parties to a shareholders' agreement cannot provide for unanimity of shareholder action and at the same time give to arbitrators power to decide (*i.e.*, by an award enforcible under the statute) whether one of the parties has been guilty of such misconduct as to require his removal from the management of the company. Further, the opinion throws serious doubt on whether arbitration decisions in most controversies arising out of management and policy questions in close corporations will be enforced in New York.

A 1955 decision of the Appellate Division, First Department, is also definitely unfavorable to the use of arbitration in determining management and policy questions. In *Application of Burkin*,[14] a companion case to the *Burkin* case that reached the Court of Appeals, a shareholder in a close corporation sought to arbitrate the question of whether a mortgage on corporate property should be paid. The Appellate Division held that this question was not subject to arbitration, commenting as follows: "It is permissible and appropriate for parties, virtual partners in a close corporation, to contract to submit to arbitration disputes of a specific nature which might arise out of their relationship. But it is impossible to run a business through arbitrators or submit to arbitration matters of management policy."[15]

In those jurisdictions in which there is doubt whether agree-

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existing between them at the time of the submission, which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . . Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent, subsequent to or independent of any issue between the parties."

Should the phrase "which may be the subject of an action," as used in the first paragraph quoted above, have been held to be applicable to contracts to submit future disputes to arbitration as well as to submissions of existing disputes?

At common law almost every type of dispute or difference could be settled by arbitration, even disputes that would not support a cause of action at law or in equity. Sturges, Commercial Arbitrations and Awards 198 (1930).

13. See Application of Katz, 283 App. Div. 1092, 131 N.Y.S. 2d 627 (2d Dep't 1954), *aff'd mem.*, 308 N.Y. 789, 125 N.E. 2d 433 (1955) (the matter of sale of corporate real estate held not to be within scope of arbitration clause, because by express provisions of the agreement a sale of realty was to be made only by unanimous vote of the parties).
14. 1 App. Div. 2d 655, 147 N.Y.S. 2d 1 (1st Dep't 1955).
15. 147 N.Y.S. 2d at 2.

ments to arbitrate management and policy disputes can be enforced under an arbitration statute which provides in general terms for the enforcement of future disputes agreements or which provides only for the arbitration of disputes which are justiciable, the statute should be amended to leave no question that shareholders in close corporations may provide for arbitration of their disputes without regard to the justiciable character of such controversies. The New York Civil Practice Act[16] now provides for the arbitration of disputes between labor unions and employers "without regard to the justiciable character of such controversy or controversies," and no reason is apparent why a provision to the same effect should not be made applicable to disputes in close corporations and perhaps to other commercial disputes. It is encouraging to note that the latest version of the Uniform Arbitration Act, whatever may be its defects otherwise,[17] provides for effective enforcement of agreements to arbitrate future disputes irrespective of whether courts would take cognizance of the disputes.[18] That Act contains the following statement: "But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."[19]

A number of objections have been advanced to the use of arbitration to settle disputes in close corporations. The arbitral process, it has been said, is not adapted to making management decisions and formulating policy; and the claim is made that arbitration is not capable of maintaining a structure for the intimate and continuing relationships incident to the management and operation of a close corporation. Further, some people think that decisions on matters of business judgment made by arbitrators will not be accepted by the participants. And still another objection is based on the belief that whenever participants in a close corporation cannot resolve their differences by discussion and negotiation, arbitration is powerless to heal the breach: though a decision may be made by arbitrators, it is

16. N.Y. Civ. Prac. Act § 1448.
17. See Frey, The Proposed Uniform Arbitration Act Should Not be Adopted, 10 Vand. L. Rev. 709.
18. Pirsig, Some Comments on Arbitration Legislation and the Uniform Act, 10 Vand. L. Rev. 685, 692 (1957).
19. Uniform Arbitration Act § 12. The Uniform Arbitration Act was adopted by the National Conference of Commissioners on Uniform State Laws, August 20, 1955, as amended, August 24, 1956, and was approved by the House of Delegates of the American Bar Association, August 26, 1955, and August 30, 1956.

said that the participants will never again be able to work together effectively.[20]

Actually all of these objections are grounded on assumptions, assumptions which apparently have not been carefully examined, much less established as facts. Some of the objections seem to ignore the moral force of arbitration and the inclination of sensible businessmen to accept a decision fairly arrived at by disinterested third persons. Perhaps also too little weight is given the reluctance of most businessmen in close corporations to see a profitable business destroyed by deadlock or dissension, and their realization that some destroyed must be set up and accepted by all parties concerned if ruin of the business is to be avoided.

The usefulness of arbitration in close corporations cannot be established finally and its workable limits fixed with any measure of exactness until arbitration has been tested by actual use in a large number of businesses over a considerable period of time; and narrow statutes and unfavorable judicial decisions can prevent experimentation and testing. When a New York court states that it is impossible to submit to arbitration matters of management policy,[21] the court is stating a conclusion which it does not have reliable data to support. Certainly many businessmen and their experienced lawyers think that arbitration is serviceable in resolving disputes on management and policy questions, as the increasing popularity of arbitration in that area demonstrates. In any event, whether or not to set up an arrangement for the arbitration of management and policy disputes is a decision that should be made by businessmen, not by courts. If a court strikes down an arbitration arrangement (which affects only persons who have consented to it) on the ground that the arrangement is unwise from a business point of view or is not capable of achieving the objectives the participants desire, the court is stepping outside of its proper province and unnecessarily encroaching on the contractual freedom of the participants. The guess might well be hazarded that an arrangement for the arbitration of management and policy questions may be serviceable and wise in some close corporations and not in others, depending on such considerations as

20. These objections to the use of arbitration in close corporations are discussed in more detail in O'Neal, Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration, 67 Harv. L. Rev. 786, 790-93 (1954).

21. Application of Burkin, 1 App. Div. 2d 655, 147 N.Y.S. 2d 1, 2 (1st Dep't 1955).

the personalities of the participants and the availability of other methods of resolving disputes when they arise. Decisions based on considerations of that type can certainly be better made by the businessmen involved than by the courts.

In conclusion, it may be said that for arbitration to be effective in close corporations, the participants must be able to set up in advance arrangements for the arbitration of future disputes, including disputes that may not be justiciable in the courts. Statutes which fail to provide for the enforcement of agreements to arbitrate future disputes or which bar agreements for the arbitration of disputes which are not justiciable arbitrarily deprive businessmen of the privilege of experimenting to determine the workable limits of arbitration in resolving intra-institutional disputes in close corporations.

# ARBITRATION: SUBSTANTIAL JUSTICE IN PRIVATE DISPUTES

An Address Before the Bar Association of The District of Columbia

by Judge Nathan Cayton

Once again you have invited me to come and talk with you and again I am honored and most grateful. Several times in the past you have given me the opportunity to account for my stewardship as judge. A little over a year ago, on the occasion of my retirement from active judicial service, you bestowed upon me your highest accolade—your Certificate of Distinction and Merit, which I shall cherish as long as I live.

Tonight you have been kind enough to include me in one of your most important programs. You have asked me to discuss arbitration of court cases. That, I take it, includes not only cases in court, but cases which may be on their way to becoming court cases: private or commercial arbitration, as it is sometimes called.

Perhaps I ought to start out by suggesting what private arbitration is not. It is not nickel-in the-slot justice. It is not modern automation injected into legal procedure. It is not a device for boycotting or supplanting the courts.

Except for the matter of delays (which I shall mention later) our courts here in the District, and elsewhere in most places, have done a highly commendable job. And I for one shall never sponsor any system which does not conform to and embrace the fundamental methods of American legal procedure as we have known it and come to believe in it and trust it.

Arbitration is not a scheme which would reduce the need for lawyers. In all the changes which have come in judicial administration, the one "inescapable constant" has been the necessity for the services of the lawyer. Hardly any system of law has ever been devised in which the citizen—the man in trouble—could function without expert guidance. That guidance always was and always will be the function of the lawyer.

And now, having eliminated the negative, let me latch on to the affirmative. What is arbitration?

It is a plan or system as old as the courts, and probably older. It is a method by which parties to a dispute select someone they trust and authorize him to resolve that dispute, and agree to be bound by his decision.

For more than 50 years our Code has provided not only for "common law" arbitration, but also for arbitration of cases pending in Court. For more than 30 years the U. S. Arbitration Act has been operative in commercial disputes here in the District of Columbia. The operative methods are spelled out in the statute books and I need not discuss them now.

This statutory type of arbitration, and general arbitration as well, has many times been upheld and encouraged by the highest courts in the land.

How does private arbitration work?

When counsel for both sides to a dispute feel that the interests of their clients would be better served by arbitration, they can obtain the services of an arbitrator through the American Arbitration Association, or the American Institute of Architects, or some similar professional organization, or by direct agreement and selection. If the dispute involves technical or expert knowledge, expert arbitrators are available. (Usually, if you have an expert arbitrator, you will not have so much need for expert witnesses.)

If you prefer a board of three arbitrators, that can be accomplished almost as easily. (There are various methods of selection which I need not discuss tonight.)

Then counsel prepare a simple form of submission, by which the parties agree to be bound by the arbitration decision. There are no long delays; indeed there need be no delays whatever. The arbitrator is usually ready to hear the case as soon as you are. Therein is another advantage: counsel select the time, instead of waiting to be reached on a long calendar.

Procedure is about the same as in a court trial. Hearings are informal; everybody is heard at length, but no time is wasted. Decisions are usually rendered very promptly. (The rules of the American Arbitration Association require that the award be made within thirty days, but they are almost always made before that deadline.)

What cases do not lend themselves to arbitration? Divorce and annulment, and most phases of probate litigation are usually not

considered proper cases for arbitration. Just about all other types of private or commercial dispute are subject to arbitration, and have been arbitrated, many thousands of times.

It is true that in some cases arbitration is not desirable. For instance, if you have a typical jury case, if you want the opinion of twelve men instead of one, that is not a case for arbitration. But I have heard it said, in answer to the suggestion that an arbitration decision may be uncertain, "What is more uncertain or unpredictable than the verdict of a jury?"

Another situation is when a case is so saturated with legal questions that both sides know in advance that however it is decided it will go to appeal, and the decision on appeal is the real objective. Such a case should not be arbitrated; such a case belongs in court. On the other hand, when you stop to think about it, you will realize that of all the thousands of cases which are tried in court, only a small handful are ever appealed. And according to the latest statistics I have looked at, the percentage of reversals (all over the country) has been averaging only about one in three appeals. So it would seem that the advantage of appeal is not so bright or comforting as may first be thought.

On the subject of fees: It has many times been demonstrated that lawyers suffer no loss of fees in arbitration cases, even on a daily or hourly billing basis. Their fees in these cases may even run higher, because they lose no time in getting a hearing, there is much less need for tiresome brief work, they can make better and more efficient use of their time, and they are more apt to have satisfied clients. For instance: the business man who has a dispute with a customer or competitor is not usually out for revenge. He wants to get it over with and get back to his business.

Then, too, most litigants are afraid. Afraid of publicity, afraid of loss of face or standing among their friends, or just plain afraid of courts. Courts should and do command respect. But sometimes the mere thought of judicial trappings chills and frightens the average citizen. In arbitration this apprehension is dissipated. All the actors, parties, witnesses and lawyers, are grouped informally around the hearing table on the same level with the arbitrator. The lawyer looks the arbitrator in the eye as an equal. I have never heard of an arbitrator frightening anyone. He relies on his personal and moral authority in the conduct of hearings.

It is accurate to say that in the various arbitrations I have

observed or with which I have been identified, the lawyers and parties have found the procedure satisfactory, and that most if not all of them would turn to arbitration again in similar circumstances. I do not suggest that the losing parties were always delighted at having lost. But I do say that they were satisfied with the way their cases were handled and glad to be spared the formalism and long delay of a court trial.

I have many times been asked whether arbitration can solve the problem of court congestion.

At this point let me say that the problem is serious, very serious. In the past couple of weeks I have been going over records and reports submitted to the Attorney General's Conference on Court Congestion. They tell a dismaying story, repeated in far too many state and federal jurisdictions, of thousands of citizens who are compelled to wait as long as two and even three years for a chance to tell their stories in court. They tell the all-too-familiar story of lawyers and parties and witnesses dragging themselves to court, only to be told to come back another day. They tell a story of frustration and resentment. There is something wrong—seriously wrong, when situations like those are found so frequently and over so wide an area as to amount to a pattern. Unless corrected, these have the makings of a public scandal.

We know well enough that extreme situations, situations of scandal and near scandal, beget extreme proposals, like those we have been hearing recently that automobile collision cases be taken out of the courts and tried by compensation boards or commissions. I find no comfort in such proposals. I, for one, would not like to see great masses of litigation channeled into special boards or commissions, or hastily established tribunals. I don't believe in second-class or junior-grade courts. I don't believe in jerry-built court systems.

There is nothing second-class or radical about arbitration. It has long ago proven itself as a highly satisfactory and efficient method of settling disputes.

And there is little or no doubt that modern-day court congestion has caused many people to volntarily turn to arbitration as a much quicker means of getting their disputes settled. Officially, too, there has been a growing acceptance and development of arbitration as a satisfactory method of getting large numbers of cases off the court dockets. New York has tried it twice, and the report is that large trial backlogs have been quickly reduced. Pennsylvania has in

very recent years created statutory arbitration procedure to cope with a large accumulation of negligence cases. Judges and lawyers alike have reported that the system has been a success.

It is very interesting to note that one of the strongest and most enthusiastic advocates of the plan is the vice-president of one of the nation's largest insurance groups. He emphasizes that the insurance industry wants to avoid litigation, and to dispose of it quickly when it cannot be avoided. Reports like this have come from many parts of the country, where thousands of private disputes have been arbitrated.

To what extent arbitration will be further developed here in the District is primarily a matter for you, the practicing lawyers, to decide. You can have it if you want it. You can have as little or as much of it as you want. You will decide, on a selective basis, when you think this method will be most satisfactory to your clients. I am urging nothing except that you consider it and try it, not as a substitute for our courts, but as an auxiliary method.

I would also urge you—particularly the younger lawyers—to make yourselves available to serve as arbitrators. You will find it a rewarding experience, and you will "learn by doing" how the judicial mind works. If it is true that most lawyers dream of becoming judges, then there is no better way to learn whether you would really like judicial work. And there is probably no better way for the Bar to learn whether a lawyer is good judicial timber. The day may not be very far off when the appointing powers will consider recruiting some of our judges from the ranks of experienced arbitrators.

In whatever capacity you devote your efforts in the field of arbitration, you will be making a contribution to our profession by keeping alert to the rights and needs of the litigating public. You will also have the great satisfaction of knowing that you have helped in the cause to which all of us are dedicated: the cause of assuring that right prevails and that justice is done between man and man.

# REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* V. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

## I. THE ARBITRATION CLAUSE

ARBITRATION CLAUSE IS INVALID WHEN IT REFERS TO ARBITRATION BEFORE THE BOARD OF DIRECTORS OF ONE OF THE PARTIES, the court holding that no party may be the judge of his own case. Said the court: "We brush aside any metaphysical subtleties about corporate personality, and view the agreement as one in which one of the parties is named as arbitrator. Unless we close our eyes to realities the agreement here becomes not a contract to arbitrate but an engagement to capitulate." *Cross & Brown Co. v. William E. Nelson,* 4 App. Div. 2d 501, 167 N.Y.S. 2d 573 (Valente, J.).

COURT WILL NOT ENJOIN SHOWING OF FILM ON A DISPUTED CLAIM THAT SCREEN CREDITS WERE NOT IN ACCORDANCE WITH AN AWARD WHERE DEFENDING PARTY DENIES HAVING CONSENTED TO ARBITRATION. A professional writer of screenplays and scripts for motion pictures claimed credit for the script of the film "Around the World in 80 Days," as well as for all promotional advertising, relying on an allegedly established practice in the motion picture industry. He contended that he had submitted this issue for arbitration to the Writers Guild of America, West, Inc., which rendered a decision that credit for the picture was to be given to three persons, one of them being the plaintiff and the two others being Messrs. Farrow and Perelman. The defendants denied that they ever consented to submit the matter for arbitration to the Writers Guild and that, at the request of the Guild, they had only notified the latter of their intention to give credit to Perelman alone. In denying a motion for preliminary injunction to enjoin the exhibition of the picture without giving the plaintiff credit for the screenplay, the court said: "In any event, the defendant denies that the information it sent to the Writers Guild was a contract for or submission to arbitration of any question of screen credit or that it agreed to be bound by this determination. Significantly the defendant points out that if in fact there were such an award under an arbitration agreement it would be enforceable as such and no proceeding of any kind with respect thereto has been taken." *Poe v. Michael Todd Co.,* 151 F. Supp. 801 (S.D. N.Y., Weinfeld, D.J.).

COURT WILL NOT DIRECT ARBITRATION WHERE DOUBT EXISTS AS TO WHO IS THE PARTY TO THE DISPUTE. Under a charter party providing for arbitration one respondent designated its arbitrator whereas the other respondent refused to arbitrate on the ground that it had executed the charter party as agent for the first who owned the vessel. The court denied a motion to direct the second respondent to proceed with arbitration inasmuch as questions of fact were presented, since the making of the charter party by the second respondent was in dispute. *Instituto Cubano de Estabilizacion del Azucar v. The Theotokos,* 153 F. Supp. 85 (Dawson, D. J.).

AWARD IS BINDING UPON WIDOW WHO INHERITED BUSINESS FROM HUSBAND when business continued under same name and collective bargaining agreement under which award was rendered renewed itself automatically by failure of parties to give 60 days' notice of termination at expiration date. Moreover, the agreement provided that it "shall bind and inure to the benefit of the Employer, its successors and assigns and to the Union, its successors and assigns." *Greenstone v. Amusement Clerks and Concessionaires Employers Union, Local 1115c, R.C.I.A.,* 166 N.Y.S. 2d 858 (Jacob Markowitz, J.).

LOCAL UNION IS BOUND BY ARBITRATION CLAUSE OF CONTRACT WHERE IT PARTICIPATED IN NEGOTIATIONS AND RECEIVED THE BENEFITS OF THE AGREEMENT WHICH THE MEMBERS HAD RATIFIED DESPITE THE FACT THAT THE LOCAL UNION DID NOT SIGN IT. Said the court: "The law is that while contracts to arbitrate controversies must be in writing, they need not be signed so long as there is indicative proof of actual agreement." *Nimphius v. Greyhound Corp.,* 165 N.Y.S. 2d 996 (Lupiano, J.).

## II. THE ARBITRABLE ISSUE

CLAIM OF MISMANAGEMENT AND WILLFUL WASTE OF CORPORATIONS' ASSETS IS ARBITRABLE under an arbitration clause providing for the settlement of differences between the parties "in the conduct and operation of the business of the corporations." Thus, a motion for a stay of the court action until arbitration had been held was granted. *Friedman v. Bernard,* N.Y.L.J., July 25, 1957, P. 2, McGivern, J.

DISPUTE OVER WHETHER CONTRACTOR WAS REQUIRED TO INSTALL CERTAIN FIXTURES AT HIS OWN EXPENSE IS NOT ARBITRABLE under the American Institute of Architects' General Conditions of Contract for Construction of Buildings, inasmuch as that contract requires that the architect's decision as to quality and acceptability of work be final. In the opinion of the majority of the Appellate Division, Second Department, the finality of the architect's decision should not be limited only to execution of work, but should also apply to interpretation of contract documents. *Board of Education of Union Free School Dist. No. 1 v. A. Barbaresi & Son,* 165 N.Y.S. 2d 712.

UNION'S DEMAND THAT BARBER SHOP OWNERS ASSOCIATION JOIN AN EMPLOYERS' GUILD IS NOT ARBITRABLE inasmuch as this was not required by the collective bargaining agreement. Furthermore, this demand had been made by the union and rejected by the employers prior to conclusion of negotiation of the agreement. *Broadway Master Barbers Ass'n, Inc. v. Barbers & Beauty Culturists Union of America, Local No. 3, AFL-CIO,* N.Y.L.J., Sept. 6, 1957, p. 5, McGivern, J.

COURT RULES THAT QUESTION OF ARBITRABILITY IS FOR ARBITRATOR TO DECIDE in absence of specific reference in arbitration clause of the collective bargaining agreement to determination of arbitrability by the courts. The dispute concerned the right of employees to pro-rata vacation and Christmas bonus pay after employer discontinued business for economic reasons. Denying the company's motion for a stay of arbitration, the court said: "In the case at bar there is no reference in the arbitration clause to determination of arbitrability by the courts. In absence of such a reference and in the light of the language used I rule that the question of arbitrability is for the arbitrator." *Monument Mills, Inc. v. Textile Workers Union of America, AFL-CIO, Local No. 1370,* 152 F. Supp. 429 (D.C. Mass., McCarthy, D. J.).

DISPUTE OVER WHETHER FREE LANCE PHOTOGRAPHERS ARE EMPLOYEES OF NEWSPAPER WITHIN MEANING OF COLLECTIVE BARGAINING AGREEMENT IS NOT ARBITRABLE where the contract expressly excludes from coverage "contributors on a free lance basis." Although the arbitration clause applied to "all grievances arising from the application of this agreement," a stay of arbitration was ordered, the court referring to *Matter of International Ass'n of Machinists,* 271 App. Div. 917, 918, aff'd 297 N.Y. 519, where it was said: "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." *N. Y. Mirror v. Potoker,* N.Y.L.J., Oct. 23, 1957, p. 7, Benvenga, J.

DISPUTE OVER APPLICATION OF SENIORITY IN PROMOTIONS IS NOT ARBITRABLE ON THE BASIS OF THE UNION'S CONTENTION THAT THE COMPANY HAD NO OPTION BUT TO PROMOTE THE SENIOR QUALIFIED EMPLOYEE where the contract merely obliges the company to give "consideration" to seniority. A collective bargaining agreement provided that the company, in upgrading employees to higher rated jobs, "will take into consideration as an important factor, the relative length of continuous service of the employees whom it finds are qualified for such upgrading." A decision of Special Term which considered the dispute arbitrable (digested in *Arb. J.* 1957, p. 167), was modified to the effect that seniority, though an important factor, was not the only factor, and that therefore no arbitrable issue was presented by the contention of the union that there was no discretion by the company as long as one employee was senior to another. However, the Appellate Division found that the good faith of the company might be challenged in arbitration "by presenting proof that

the company either purported to find Shell unqualified when it actually found him qualified, or that it upgraded another employee in preference to Shell without taking into consideration the relative length of continuous service of the two employees." *Carey v. General Electric Co.*, 4 A. D. 2d 462, 166 N.Y.S. 2d 953 (App. Div., 1st Dept.).

DISCHARGE OF EMPLOYEES IS NOT ARBITRABLE WHERE AGREEMENT REFERS TO ARBITRATION BEFORE A CONVERSION BOARD WITH POWERS TO ACT ONLY WITH RESPECT "TO TRANSFERS, LAYOFFS, PROMOTIONS, QUALIFICATIONS OR OTHER DISPUTES IN CONNECTION WITH CONVERSION" FROM STREET CARS TO BUSES. The court construed this clause as not applying to discharges, "since a discharge is the termination of employment at the will of the employer with prejudice because of some fault on the part of the worker or on some other ground upon which the employer chooses to base his right in effecting the discharge. To discharge an employee removing him from his employment there must be some affirmative action taken by the employer indicating that he will no longer be bound by employment contract." *Anderson v. Twin City Rapid Transit Co.*, 28 LA 695 (Minn. Sup. Ct., Nelson, J.).

## III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

NORTH CAROLINA APPELLATE COURT WILL NOT ENJOIN ARBITRATION IN NEW YORK WHEN SUCH ARBITRATION IS PROVIDED FOR IN CONTRACT OF PARTIES. A North Carolina seller of cotton yarn was fully paid by the New York buyer who claimed, however, that the warranty of the seller for pure cotton had been breached and the buyer greatly damaged thereby. Since the contract was subject to the provisions of the Cotton Yarn Rules as revised, which provide for proceedings before the General Arbitration Council of the Textile Industry, the buyer initiated arbitration in New York City, specified in those rules in accordance with the laws of the State of New York "if the parties are unable to agree on time, place, method, or rules of arbitration." An application of the North Carolina seller to restrain the buyer from proceeding with arbitration in New York and to have all matters pertaining to the controversy decided by the courts of North Carolina, was granted, but such decision was considered an error and reversed by the Supreme Court of that state.

As to the claim for an injunction to force the defendant to litigate in North Carolina courts, the court said: "The defendant is the party who asserts the claim, and the only party claiming damage. The defendant alone has the right to elect whether to bring suit. The right to sue involves the right to select the time, the place, and the tribunal. If suit is brought in the wrong jurisdiction, the remedy is a motion to dismiss; if in the wrong venue, a motion to remove. If the suit is brought in the proper jurisdiction and in the correct venue, the plaintiff will have ample time and opportunity to appear, answer, and defend. Courts will not grant the equitable relief of injunction when there is an adequate remedy at law." *Amazon Cotton Mills Co. v. Duplan Corp.*, 96 S.E. 2d 267 (Higgins, J.).

STATUTE OF LIMITATIONS FOR INITIATING COURT ACTION IS NOT AFFECTED BY ARBITRATION PROVISION AND DELAY IN DEMANDING ARBITRATION DOES NOT EXTEND STATUTE OF LIMITATIONS. Under a government contract for the manufacture of anti-aircraft guns, a dispute arose as to whether the government was permitted to export these guns and thus compete with the inventor's interest in selling guns or licenses to manufacture them to other countries. This dispute on the meaning of the contract arose in 1942 but the plaintiff did not request arbitration, as provided for in the contract, until May 23, 1947. The request was rejected by the Navy Department and plaintiff claimed that its right to sue did not arise until its request for arbitration had been rejected. In refuting this argument the Court of Claims said: "The Government says that the running of the statute of limitations was not affected by the arbitration provision. We think the Government is right. The arbitration agreement is a provision for extrajudicial resolution of disputes, analogous to administrative remedies which are often available. A party may be barred from suit for failure to exhaust such remedies, but normally, the statute of limitations runs while he is pursuing them. In the case of arbitration agreements, with no time limit, it would be intolerable that a party should prevent the statute of limitations from even beginning to run, merely by delaying his request for arbitration." A further contention of the plaintiff that the government's refusal to arbitrate was a breach of contract, was likewise refuted by the court, since the only effective judicial remedy for such refusal would be specific performance, a remedy not available against the U.S. as it had not consented to be a party to such suits. The plaintiff obtained a judgment against the government for unauthorized exportation, but only for those violations which occurred no more than six years before the filing of petition. *Aktiebolaget Bofors v. United States,* 153 F. Supp. 397 (Court of Claims, Madden, J.).

COURT WILL NOT DIRECT ARBITRATION OF DISPUTE OVER REDUCTION OF SEPARATION ALLOWANCE BETWEEN HUSBAND AND WIFE where contract makes it clear to the court that "it was never the intention of the parties that the reduction was ever to be below the fixed sum of $100 per week." *Braverman v. Braverman,* N.Y.L.J., Nov. 1, 1957, p. 10, Friedman, J.

RIGHT TO ARBITRATE WAS WAIVED WHEN PARTY TO CONSTRUCTION CONTRACT COMMENCED AN ACTION TO FORECLOSE A MECHANIC'S LIEN. Furthermore, the court held, the right to arbitrate was not reinstated when the action was discontinued. Commenting on the fact that the creditor, after the filing of the mechanic's lien, did not inquire whether an arbitrable controversy existed, the court said: "The allegation of petitioner that it did not know whether respondent would defend an action is not the equivalent of a statement that petitioner did not know whether any arbitrable controversies existed." The motion for the designation of an arbitrator by the court was therefore denied. *Acme Cassa, Inc. v. Staten Island Plaza, Inc.,* 7 Misc. 2d 353, 162 N.Y.S. 2d 500 (Hart, J.).

COURT WILL NOT ENFORCE ARBITRATION UNDER AN AGREEMENT WHICH REQUIRES EXCLUSIVE JURISDICTION OF FOREIGN COURTS. Under a towage agreement between a Liberian and a Netherlands corporation for the salvage of a German vessel, the settlement of disputes was to be submitted to the District Court of Rotterdam, Holland "to the exclusion of any other judge." Whereas agreements providing for foreign *arbitration* are enforced by American courts, a reference to exclusive jurisdiction of foreign *courts* is generally not enforceable. Thus it was said: "It is no longer the law that contractual provisions which purport to limit a jurisdiction which would otherwise attach are void and unenforcible. . . . Nevertheless, such agreements, particularly those calling for exclusive jurisdiction in a foreign court, are not looked upon with favor and will not be enforced by the Federal courts if they are unreasonable in themselves or in the effect they may have on the rights of the parties to the dispute." *Chemical Carriers v. L. Smit & Co.'s Internationale S.*, 154 F. Supp. 886 (F. Van Pelt Bryan, D.J.).

ACTION OF LONGSHOREMAN FOR INJURY ABOARD VESSEL STAYED PENDING ARBITRATION where liability of charterer arose out of charter party agreement which contained provision for arbitration. A charter party between a foreign shipowner and North German Lloyd as charterer provided for arbitration in Bremen, Germany of "any disputes arising from the present agreement." This agreement also provided for certain obligations of the charterer to keep the shipowner free from liability. Such liability arose out of an injury of a longshoreman on board the ship on the Brooklyn waterfront in view of the ship's alleged unseaworthy condition and negligence in maintenance of safety devices. The court considered the liability of the charterer as existing only by reason of the charter party and considered a further stay of the action of the longshoreman appropriate "upon a showing that arbitration proceedings as contemplated by the quoted terms of the charter have been promptly initiated." *Giuffre v. The Magdalene Vinnen and North German Lloyd*, 152 F. Supp. 123 (E.D. N.Y., Byers, D.J.).

ARBITRATION OF DISPUTE OVER DIVISION OF PARTNERSHIP ASSETS DIRECTED AFTER NOTICE OF TERMINATION WAS GIVEN ALTHOUGH TERMINATION HAD NOT YET BECOME EFFECTIVE. A partnership agreement provided in case of termination that "all of the assets of the partnership then remaining shall be divided in cash or in kind as the parties hereto may agree," and in case of non-agreement, for arbitration. Following notice of termination, one party demanded arbitration on the question whether the remaining assets should be divided in cash or in kind. Such demand was challenged as premature, since it was made before the termination became effective. However, the court denied a motion to stay arbitration in stating that the agreement requires "that the question be settled as soon after notice of termination of the partnership agreement as practicable, so that each partner may make such arrangements or enter into such partnership or other business agreement as he may deem necessary and advisable." *Van Laven v. Nethe*, N.Y.L.J., Nov. 18, 1957, P. 6, Benvenga, J.

**ACTION BY INDIVIDUAL EMPLOYEE AGAINST THE EMPLOYER, THE UNION AND AN EMPLOYERS' ASSOCIATION FOR ALLEGED UNLAWFUL DISCHARGE IS STAYED PENDING ARBITRATION WHERE UNION UNDERTAKES TO PROCEED TO ARBITRATION IN EMPLOYEE'S BEHALF.** Claim for wrongful discharge before the termination of the agreement was advanced by the discharged employee against the former employer, the union and the employers association for alleged conspiracy. The court stayed this action until arbitration could be had, saying: "It is obvious that this cause of action is founded upon and arises entirely out of the collective bargaining agreement. The agreement provides for arbitration of 'any complaints, grievances or disputes' not alone between the employers' association and the union, but between 'the members of the Association and any employee' as well. It follows that the first cause of action must be arbitrated (*Ott v. Metropolitan Jockey Club,* 282 App. Div. 946, 125 N.Y.S. 2d 163, aff'd 307 N.Y. 696, 120 N.E. 2d 862, reargument denied 309 N.Y. 948, 132 N.E. 2d 317; *Johnson v. Kings County Lighting Co.,* Sup., 141 N.Y.S. 2d 411). . . . The union, moreover, expresses its willingness to proceed to arbitration under the agreement in the plaintiff's behalf. In the circumstances, no good ground exists why the dispute should not be arbitrated."

As to the second cause of action, conspiracy in a deliberate design to terminate the plaintiff's employment, the court said: "As to the employer the second cause of action may well be arbitrable; in any case, a determination of the arbitration, even on the first cause of action alone, in favor of the employer, might be destructive of the plaintiff's claim on both causes of action as against all the defendants. See *Israel v. Wood Dolson Co., Inc.,* 1 N.Y. 2d 116, 118; 151 N.Y.S. 2d 1. In the circumstances, discretion dictates the propriety of staying proceedings under the second cause of action until the termination of the arbitration (*Dot's Boulevard Corp. v. Rosenfeld,* 285 App. Div. 425, 137 N.Y.S. 2d 470)." *Diamond v. Robert Hall Clothes,* 6 Misc. 2d 916, 164 N.Y.S. 2d 112 (Hofstadter, J.).

**FOREIGN CORPORATION NOT AUTHORIZED TO DO BUSINESS IN NEW YORK MAY INSTITUTE ARBITRATION** inasmuch as arbitration is a "special proceeding" (sec. 1459 C.P.A.), not an "action based on the contract" (sec. 218 General Corporation Law). An award rendered pursuant to an arbitration agreement in New York was therefore confirmed. *Terminal Auxiliar Maritima S.A. v. Cocotos SS. Co.,* N.Y.L.J., Oct. 21, 1957, p. 5, Benvenga, J.

**CITY COURT ACTION INVOLVING FINANCIAL DISPUTE BETWEEN HUSBAND AND WIFE STAYED PENDING ARBITRATION** before a board of three rabbis who were selected to settle the couple's marital and financial disputes. Said the court: "The board can apply the legal, moral and religious law to the dispute between the parties which is what the parties contemplated and intended when they agreed to arbitrate their dispute before such board." *Berk v. Berk,* N.Y.L.J., Oct. 8, 1957, p. 11, Brown, J.

COURT WILL NOT DIRECT ARBITRATION WHERE CONDITIONS PRECEDENT AS REQUIRED BY THE AGREEMENT HAVE NOT BEEN COMPLIED WITH. Under a collective bargaining agreement, arbitration could be initiated only after a grievance was presented before the Eastern Executive Council of the Amalgamated Divisions and after that body had given permission for arbitration. An attempt to compel arbitration of a dispute over seniority rights, brought about by rerouting of bus schedules affecting other locals, was rejected, the court saying: "The respondent does not deny the right to arbitrate grievances; it merely insists that there be compliance with the terms of the new governing agreement before arbitration is effected. . . . Plainly, to permit arbitration in this case would lead to inequitable, rather than equitable results. And to permit a local to take selfish and unilateral action would defeat one of the purposes of collective trade unionism. The petitioner has been invited to submit its grievance to the Eastern Executive Council. This appears to be the proper forum for this arbitration." *Nimphius v. Greyhound Corp.*, 165 N.Y.S. 2d 996 (Lupiano, J.).

GRIEVANCE ARISING DURING CONTRACT REMAINS ARBITRABLE AFTER EXPIRATION OF CONTRACT. When alleged violation of collective bargaining agreement by refusal to employ union contractors occurred during period of agreement and notice of arbitration was served before termination of agreement, arbitration cannot be stayed, under the authority of *Lane v. Endicott Johnson Corp.*, 274 App. Div. 833, aff'd 299 N.Y. 725, where it was said: "The fact that the contract is no longer in existence is immaterial." Moreover, the court set forth the well-settled rule whereby "all acts of the parties subsequent to the making of the original agreement which raise issues of fact or law are within the exclusive jurisdiction of the arbitrators (*Lipman v. Haeuser Shellac Co.*, 289 N.Y. 76; *Matter of Compagnie Francaise des Petroles*, 305 N.Y. 588)." *Burton Mfg. Co. v. Joint Board of Shirt, Leisurewear, Robes, Gloves and Rainwear Workers Union of the Amalgamated Clothing Workers of Am.*, N.Y.L.J., Oct. 31, 1957, P. 5, Benvenga, J.

OREGON COURT REFUSES TO ENFORCE ARBITRATION OUTSIDE THE STATE UNDER COMMON LAW, inasmuch as Oregon Arbitration Statute provides for enforcement of agreements to arbitrate future disputes only when those arbitrations would be held within the state. After the discharge of a railroad employee who had injured himself on the job was settled, the company refused to re-employ him. He did not take the case to the National Railroad Adjustment Board, but sued the company for breach of seniority provisions of the collective bargaining agreement by refusing to rehire him. The question arose whether the employee was prevented from instituting the action, since he had not complied with the agreement to arbitrate, as a condition precedent to an action, by referring for arbitration to the appropriate division of the National Railroad Adjustment Board. Oregon arbitration law provides for the enforcement of future arbitration clauses solely under agreements to be executed in Oregon. Since, as the court said,

"the chosen arbitrator, the NRAB, meets in Chicago, the arbitration is not to be performed in Oregon. It therefore falls into the category of general arbitration agreements governed by common law, and its performance is not a condition precedent to court action." However, it considered the employee estopped from bringing an action in view of the settlement had, and granted a motion of the railroad for summary judgment dismissing the action. *Sands v. Union Pacific Railroad Co.*, 148 F. Supp. 422 (D. Oregon, Solomon, D.J.).

MOTION TO STAY ARBITRATION DENIED DESPITE FACT THAT GRIEVANCE PROCEDURE WAS NOT EXHAUSTED where employer (a widow who inherited her husband's business), in refusing to negotiate a contract renewal and in hiring employees of another union affiliation, indicated that she had no intention of exhausting grievance procedure. A motion to stay the first union from proceeding with arbitration was therefore denied. *Greenstone v. Amusement Clerks and Concessionaires Employers Union, Local 1115c, R.C.I.A.*, 166 N.Y.S. 2d 858 (Jacob Markowitz, J.).

COURT ACTION BARRED BY ARBITRATION CLAUSE OF CONSTRUCTION CONTRACT DESPITE FACT THAT ARBITRATION IS NO LONGER AVAILABLE DUE TO LAPSE OF TIME WITHIN WHICH ARBITRATION MAY BE DEMANDED. A party had not challenged an architect's decision within ten days, in accordance with the usual provision of the American Institute of Architects contract form, nor was arbitration demanded before the date of final payment, as also provided therein. When arbitration was demanded six months later, the court said: "Arbitration of these items is no longer available and respondent is precluded from suing at law on the claims. That is the result of the agreement of the parties which provides for the exclusive remedy of arbitration and prevents either party thereto from avoiding the consequences of their agreement." *Duke Laboratories v. Albert A. Lutz Co.*, N.Y.L.J., Nov. 12, 1957, p. 6, Jacob Markowitz, J.

FAILURE TO OFFER OR SEEK ARBITRATION CONSTITUTES A WAIVER OF RIGHT TO ASSERT ARBITRATION CLAUSE AS A DEFENSE AGAINST AN ACTION. Employer's right to demand arbitration of a controversy over discharge of employees as set forth as defense in a court action of the employees is waived when, as the court said: "At no time have defendants made any offer to arbitrate or sought arbitration. They have neither demanded arbitration nor moved for a stay of this action in order that arbitration might be had on the issue of discharge as a disputed question. . . . The plaintiffs, whether bound by the clause or not, repudiated it by commencing this lawsuit and the defendants joined in the repudiation by answering to the merits without a demand for arbitration or a motion to stay the suit until arbitration could be had. Almost uniformly such conduct on the part of the parties constitutes an abandonment or waiver of the right to arbitration and a consent to the submission of the controversy to the courts. . . . Commencement of suit in a court rather than reliance upon arbitration, with answer by the opposing party upon the merits, is a waiver of the right to arbitrate by both parties." *Anderson v. Twin City Rapid Transit Co.*, 28 LA 695 (Minn. Sup. Ct., Nelson, J.).

## IV. THE ARBITRATOR

COURT WILL NOT APPOINT ARBITRATORS UNDER 1452 C.P.A. WHERE CONTRACT BETWEEN PARTIES REFERRED TO THE NEW YORK BUILDING CONGRESS WHICH DISCONTINUED ITS ARBITRATION FACILITIES. The question arose as to whether the parties intended, as the court said, "to proceed to arbitration at all events notwithstanding a frustration of their provision for the application of the rules of the New York Building Congress, Inc." The court denied a motion to appoint arbitrators under Sec. 1452 C.P.A. in stating: "In the contract here, the parties expressly agreed that the arbitration of disputes arising under the agreement was to be had in accordance with particular rules providing for a method of selection of arbitrators and providing in detail as to the procedure to be followed on the arbitration. Here, the intention to arbitrate is "so wedded to the means that the failure of the one will be the destruction of the other' (see *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 296). . . . The parties are relegated to their remedies in the courts. To hold otherwise, would amount to an unjustified modification or extension of the agreement of the parties by court decree." *Delma Engineering Corp. v. K. & L. Const. Co.*, N.Y.L.J., Dec. 2, 1957, P. 14, Eager, J.

COURT APPOINTS A SUBSTITUTE ARBITRATOR IN PLACE OF ONE WHO DISQUALIFIED HIMSELF though the agreement contained no provision for appointing substitutes. *Marcus v. Meyerson,* N.Y.L.J., Oct. 11, 1957, P. 6, Stevens, J.

ARBITRATION DIRECTED IN THE MANNER PROVIDED FOR BY PARTIES IN THE CONTRACT DESPITE THE FACT THAT THE PRESIDENT OF A CORPORATION, ONE OF THE PARTIES TO THE DISPUTE, WAS A MEMBER OF THE ARBITRATION COMMITTEE OF THE NATIONAL FEDERATION OF TEXTILES WHICH WAS NAMED IN THE CONTRACT AS THE ADMINISTRATIVE AGENCY FOR ARBITRATION. Special Term had ruled that unless the parties agreed upon another arbitration tribunal, the court would name the arbitrator. Appellate Division reversed this decision, saying: "The record is devoid of proof that Ross participated in any way in the preparation of the list of names submitted to the petitioner. It would be improper to assume, without a scintilla of proof to support the conclusion, that a responsible trade association would conspire with one of its members to deprive another of a fair determination of a controversy in an arbitration conducted under its rules. Moreover, the view that arbitrators are merely agents of the parties and, in violation of their oaths, will not be fair and impartial must be rejected in the absence of proof of such misconduct (*Lipschutz v. Gutwirth,* 304 N.Y. 58, 106 N.E. 2d 8). . . . The fact standing alone that Ross served on the committee of arbitration of the Federation provides no basis for a denial of arbitration pursuant to the contract of the parties (*Jackson & Co. v. Compania Gasoliba S.A.,* 282 App. Div. 125, 121 N.Y.S. 2d 624). We cannot rewrite the contract, nor in the absence of statutory provision therefor may we substitute arbitrators for those selected by the parties (*Lipschutz*

*v. Gutwirth,* 304 N.Y. 58, 106 N.E. 2d 8). Moreover the application here is not predicated upon any specific Section of Article 84 of the Civil Practice Act and we can find no statutory authority for the order made at Special Term. If the petitioner can establish that the award eventually made falls within Section 1462, C.P.A., it can obtain appropriate relief thereunder (*Franks v. Penn-Uranium Corp.,* 4 A.D. 2d 39, 162 N.Y.S. 2d 685)." *Brookfield Clothes v. Rosewood Fabrics,* 4 A.D. 2d 458, 166 N.Y.S. 2d 928 (Frank, J.).

COURT WILL NOT NAME ARBITRATOR WHERE PARTIES' CONTRACT REFERS TO AN AGENCY "AS ARBITRATOR." An arbitration clause in a collective bargaining agreement provided that the arbitrator "shall be selected as the New York State Board of Mediation." The court held that this clearly designated the New York State Board of Mediation as the arbitrator and that a motion that a different panel be set up to hear a dispute was not justified. *Newport Hosiery Stores v. Harlem Labor Union, Inc.,* N.Y.L.J., Oct. 23, 1957, p. 8, Gold, J.

COURT WILL NOT APPOINT THIRD ARBITRATOR WITHOUT A SHOWING THAT TWO PARTY-APPOINTED ARBITRATORS HAVE BEEN UNABLE TO AGREE ON A CHOICE where arbitration clause makes such disagreement a precondition for the court's action. Said the court: "No disagreement between the arbitrators is alleged nor does there appear to be any at this time. The court can neither anticipate that the two arbitrators will be in accord with each other nor assume that they will disagree. Until such time that the arbitrators disagree the arbitration clause cannot be invoked for the purpose of appointing an umpire. The contention of the petitioner that an umpire should be appointed at the very outset to avoid a rehearing and duplication of proceedings in the event the two arbitrators disagree is untenable in view of the language used in the arbitration clause." *Grainger v. Shea Enterprises,* 7 Misc. 2d 322 (Dineen, J.).

ARBITRATION STAYED PENDING DETERMINATION BY COURT WHETHER RESPONDENT'S FAILURE TO SELECT ARBITRATOR UNDER RULES OF THE AMERICAN ARBITRATION ASSOCIATION CONSTITUTES A REFUSAL TO ARBITRATE, the respondent claiming he was not restricted to AAA procedures under the Standard Form of Arbitration of the American Institute of Architects. Said the court: "Since an issue of fact exists as to whether or not respondent has refused to arbitrate, it must be determined at a hearing (section 1450 of the Civil Practice Act)." *Zephyr Const. Co. v. Boro Hall Corp.,* N.Y.L.J., Oct. 3, 1957, p. 11, Brown, J.

WHETHER A CLAIM OF RESCISSION WAS INVALID IS FOR ARBITRATOR TO DETERMINE. Said the court: "All acts of the parties subsequent to the making of the contract which raise issues of fact or law lie exclusively within the jurisdiction of the arbitrators (*Lipman v. Haeuser Shellac Co., Inc.,* 289 N.Y. 76; *Aqua Mfg. Co. v. Warshaw & Sons, Inc.,* 179 Misc. 949, aff'd 269 App. Div. 718)." *Charles S. Fields, Inc. v. Am. Hydrotherm Corp.,* N.Y.L.J., July 25, 1957, p. 2, McGivern, J.

ARBITRATOR IS THE SOLE JUDGE OF WHAT IS MATERIAL TO A CONTROVERSY AND HIS SUBPOENA DUCES TECUM MUST BE COMPLIED WITH. Said the court: "The arbitrator, without any assistance, must be the sole determiner of what is material and he must do it in such a manner that the employer is unable to see any of the immaterial content. No name of any person shall be disclosed and who was called what and when certainly will not be determined to be material, but it could be extremely harmful to the relationships involved and should not in any manner or means be disclosed. This arbitration proceeding should not be treated as a fishing expedition and the arbitartor owes an obligation to the parties and to this court, which is by law charged with enforcing his subpoenas to see that it is not." The order of the court further said: "The arbitrator, without any assistance, shall examine said minutes out of the sight of either party, and shall make a determination of what portion or portions of the contents are material, and shall make said determination of materiality in such manner that the employers or their counsel are unable to see any of the content of the minutes deemed by the Arbitrator to be immaterial. At no time shall the name of any person mentioned in any minutes be disclosed, and none of the content of the minutes deemed to be immaterial by the Arbitrator shall be disclosed to the employers or their counsel for any purpose whatsoever." *Cleveland Newspaper Guild v. The E. W. Scripps Co. and the Forest City Publishing Co.,* Court of Common Pleas, Cuyahoga County, Ohio, No. 701005, Sept. 26, 1957, Samuel H. Silbert, J.

COURT WILL NOT SUSTAIN AN APPEAL FROM A MAJORITY AWARD WHERE ARBITRATION AGREEMENT SPECIFICALLY BARS SUCH APPEAL despite fact that two dissenting arbitrators filed affidavits attacking the award. In a court action for damages to peach orchards allegedly caused by spray materials purchased from the respondent, a stipulation was entered under which defendant would pay half of the amount determined by a Board of Arbitrators. Six arbitrators were selected by the parties to determine the amount "without resort to evidence," in an award which would be binding upon the parties "without any right of appeal from the award." In a motion to set aside the majority award, affidavits of the two dissenting arbitrators were submitted. In denying the motion and confirming the award, the court said: "Defendant is bound by its contract to accept the award as final, and not to appeal from it. If either party could now attack the award, that contract would be meaningless." As to the affidavits of the dissenting arbitartors, they were not considered by the court and the court did not require the arbitrators to appear for the purpose of testifying in regard to their deliberations. Said the court: "This mode of attacking the award, in my opinion, is improper. The deliberations of an arbitration board are as much a part of the judicial process as the deliberations of a jury and should be as zealously protected. . . . Under the law of South Carolina, a juror may not testify as to the deliberations in the jury room, impeach the verdict, or contradict the record. . . . Arbitrators, like jurors, must have 'private, frank and free' discussions of the issues involved. The authorities generally hold that the testimony of an arbitrator tending to impeach the award is incompetent and should be rejected. . . . It would be

most unfair to the arbitrators to order them to come into court to be subjected to grueling examinations by the attorneys for the disappointed party and to afford the disappointed party a 'fishing expedition' in an attempt to set aside the award. To do this would neutralize and negate the strong judicial admonitions that a party who has accepted this form of adjudication must be content with the results." *Gramling v. Food Machinery and Chemical Corp.*, 151 F. Supp. 853 (W. D. South Carolina, Wyche, Ch. J.).

## V. THE PROCEEDINGS

PARTICIPATION IN ARBITRATION CONSTITUTES WAIVER OF RIGHT TO OBJECT TO AWARD ON THE GROUND THAT CONTRACT WAS INDUCED BY FRAUD. Arbitration was had under an agreement between a corporation and an architect for the latter's services. An award in favor of the architect was confirmed, despite the corporation's assertion that the architect had procured and induced his contract of employment by fraud and deceit. The confirmation by the Superior Court, Los Angeles County, was based on the fact that the corporation was estopped from asserting the claim of fraud by having continued with the arbitration after receiving information of the alleged fraud, that they had consented to an extension of time for making the award, and had waited until a notice of the motion to confirm the award had been filed. In reversing this decision, the District Court of Appeal found that when the power of the arbitrators was derived from a contract induced by fraud, any award would be in excess of the powers of the arbitrators. Said the court: "A finding that the contract was not induced by the alleged fraud cannot be supplied by the award of arbitrators to whom the issue was not submitted and who had no power to arbitrate except that granted by the questioned agreement." The court further found that the trial court, relying on laches and estoppel, "purposely made no finding on the issue of fraud." Finally, the court said: "One who has been defrauded is not required to go into court and ask for relief. He may await an attempt to enforce the agreement against him and excuse himself from performance by proof of fraud. . . . Appellant was entitled to have the issue of fraud tried by the court upon his opposition to respondent's motion to confirm and his own motion to vacate the award of the arbitrators." *Beckett v. Kaynar Mfg. Co.*, 153 A.C.A. 916, 315 P. 2d 425 (Dist. Ct. of Appeal, Second Dist., Div. 1, California, White, P. J.).

AWARD VACATED WHEN ARBITRATOR REFUSED TO GRANT POSTPONEMENT OF FIRST HEARING, the request for postponement having been based on failure of a party to produce family corporation's papers relevant to the income of one party under a separation agreement. In holding refusal to grant postponement improper, however, the court directed the respondent to pay the administrative fees and other costs of a new arbitration. *Bettman v. Bettman*, N.Y.L.J., Oct. 28, 1957, p. 12, Rabin, J.

ARBITRATOR'S SUBPOENA DUCES TECUM MUST BE COMPLIED WITH despite company's objection that since federal courts have power to apply federal substantive law by virtue of the U.S. Supreme Court decision

in *Textile Workers v. Lincoln Mills,* 353 U. S. 448, state courts would no longer have jurisdiction. In refuting the claim that federal courts *alone* have jurisdiction, the court said that sec. 301 of the Taft-Hartley Act "contains no specific or implied provision of federal preemption nor have the federal courts disturbed the delicate balance of national and state relationships in this field by suggesting the application of the doctrine of federal supersession." Moreover, in the case under consideration, a previous court order had denied a motion to stay arbitration from which no appeal was taken. The collateral attack of such order entered upon about seven months before was considered all the more improper. *Steinberg v. Mendel Rosenzweig Fine Furs,* N.Y.L.J., Sept. 18, 1957, P. 5, Jacob Markowitz, J.

ARBITRATOR PROPERLY ACCEPTED TESTIMONY ABOUT PAST PRACTICE UNDER A COLLECTIVE BARGAINING AGREEMENT, such matters constituting questions of fact about which arbitrator may make determinations. An award was therefore confirmed, the court finding no statutory ground for vacation. *Livingston v. Stern Bros.,* N.Y.L.J., Nov. 25, 1957, P. 6, McGivern, J.

## VI. THE AWARD

COURT CONFIRMS AWARD DIRECTING SPECIFIC PERFORMANCE, such award being in conformity with Rule VIII, Sect. 42 of the Commercial Arbitration Rules of the American Arbitration Association, which authorizes the arbitrator to grant any just or equitable relief including specific performance. In confirming the award, the court referred to *Freydberg Bros. v. Corey,* 177 Misc. 560, aff'd 263 App. Div. 805, where the Appellate Division affirmed a determination below expressly holding that specific performance might be awarded in an arbitration. *Grayson-Robinson Stores v. S. Klein Dept. Stores,* N.Y.L.J., Oct. 4, 1957, P. 6, Epstein, J.

AWARD IS NOT DEFINITE WHERE ITS PERFORMANCE IS DEPENDANT UPON SOME FURTHER ACTION BY A PERSON IN ORDER TO ASCERTAIN THE SUM DUE. Under the authority of *Herbst v. Hagenaers,* 137 N.Y. 290, and *Hucks v. Magoun,* 38 App. Div. 573, aff'd 167 N.Y. 540, the matter was referred back to the arbitrator "to make a definite finding as to the amount due the petitioner." *Putnam Products Co. v. Davis-Craft Corp.,* N.Y.L.J., Oct. 8, 1957, p. 7, Streit, J.

AWARD BARRING UNION FROM REOPENING AGREEMENT FOR RENEGOTIATION OF WAGES REVERSED WHERE CONTRACT PERMITTED SUCH REOPENING AND WHERE ARBITRATOR WAS FORBIDDEN TO MODIFY THE AGREEMENT. A collective bargaining agreement provided for the union's right to reopen the agreement for wage negotiations once after April 1, 1956, and further that the award be binding upon both parties "provided that the full legal rights of the parties in the courts shall not be restricted in any way. The arbitration panel shall not modify, alter, add to, or subtract from the provisions of the contract." An award of the arbitrators stated that the union did not have the right to

reopen the agreement as of April 1, 1957. The court vacated this award, as the arbitrators had gone contrary to the language of the agreement. Said the court: "It seems clear that the use of the language 'either party, may reopen this agreement once—' was intended to mean once during the first year only if the agreement were not renewed. However where it was renewed, then logically, it follows that it was intended that after the first year either party should have the right to also reopen once on or after April 1 of the renewal year. It could hardly be construed otherwise than to say that if the agreement 'shall remain in full force and effect—for successive yearly periods,' it could only remain in 'full force and effect' with the inclusion of one annual reopening by either party. To limit article XX to only the first year, but apply all the other articles to renewal years is a clear misinterpretation of the contract by the arbitrators." *United Electrical, Radio & Machine Workers of Am., Local 235 v. Union Mfg. Co.,* August 15, 1957, Superior Ct., Hartford County, Conn., Louis Shapiro, J.

AWARD DEEMED A NULLITY WHEN NOT RENDERED IN THE FORM REQUIRED BY AGREEMENT OF THE PARTIES. Insurance policies for fire loss provided that the arbitrators (two appointed by the parties, the umpire by the court) had to state separately the actual cash value and loss to each item, and to submit an itemized award in writing signed by two arbitrators. Instead, separate lump sum estimates of the loss were submitted. Said the court: "The insurers do not contest their liability for the loss, when it has been ascertained. The fact that they have gone ahead with the arbitration is an admission of liability." However, the court did not allow an action to recover on the award since the award did not strictly conform to the submissions and was therefore a nullity. The motion of the insurance company for summary judgment was granted, without prejudice to the plaintiff's right "to institute another suit or suits, if necessary, after a valid award is made by the arbitrators." *Carr v. American Insurance Co.,* 152 F. Supp. 700 (E.D. Tennessee, Robert L. Taylor, D.J.).

ARBITRATOR'S AWARD VACATED WHERE HE TOOK INTO ACCOUNT GARNISHMENT OF EMPLOYEE'S SALARY PRIOR TO SIGNING OF COLLECTIVE BARGAINING AGREEMENT, inasmuch as contract referred to terms of employment "during the period of this agreement" and barred arbitrator from modifying those terms. In vacating the award, the court remanded the matter to the arbitrator "for further action on his part." *Livingston v. D. L. & D. Corrugated Paper Products,* N.Y.L.J., Oct. 31, 1957, P. 5, Gold, J.

AWARD VACATED AND RE-HEARING ORDERED BEFORE SAME ARBITRATOR WHERE THE AWARD REQUIRED A BUYER TO MAKE PAYMENTS BEFORE DELIVERY despite the fact that the contract gave the buyer sixty days' credit after delivery for making payments. The court held that in this award the arbitrators "have exceeded their powers and have written, in effect, a new contract for the parties." *Bart Schwartz Internat. v. Rosen De Mille Corp.,* N.Y.L.J., Nov. 4, 1957, P. 5, Benvenga, J.

MATTER REMITTED TO SAME ARBITRATORS WHERE IT WAS NOT POSSIBLE TO DETERMINE WHETHER THE ARBITRATORS HAD ALLOWED COUNTERCLAIM AND HAD CREDITED RESPONDENT WITH PAYMENT, despite the fact that the award for payment of a certain sum said it was "in full settlement of all claims submitted to arbitration, by either party against the other." In denying confirmation, the court said: "An award must be certain and should be so expressed that the matters in dispute have been finally and conclusively settled (*Hiscock v. Harris,* 74 N.Y. 108) and must be so sufficiently clear to put beyond doubt what is required of each party to the arbitration (*Application of Albert J. Pfeiffer, Inc.,* 222 App. Div. 62; *Hoffman v. Harry Greenberg Co.,* 109 Misc. 170)." The matter was therefore remitted to the same arbitrators. *Matter of Boro Hall Corp.,* N.Y.L.J., Sept. 16, 1957, p. 11, Cone, J.

AWARD TO THE EFFECT THAT A CONTRACT FOR RENTAL OF ROAD BUILDING EQUIPMENT HAD BEEN BREACHED WAS VACATED WHEN RENDERED IN FAVOR OF A CONTRACTOR WHO WAS NOT LICENSED FOR CALIFORNIA PARKWAY WORK, as required by West's Ann. Bus. & Prof. Code, sec. 7028. The court also held that this issue of illegality of a contrat to be enforced or of an act for which recovery of compensation is sought may be raised for the first time in a proceeding to enforce an arbitration award. *Lewis & Queen v. N. M. Ballas Sons,* 308 P. 2d 713 (Supreme Ct. of Cal., Traynor, J.).

COURT DISMISSES ACTION BASED ON FRAUD AND FABRICATED DOCUMENTS PRESENTED IN AN ARBITRATION AFTER CONFIRMATION OF THE AWARD AND DENIAL OF A MOTION TO VACATE THE AWARD. Said the court: "The present disclaimer of the contract and claim of right to recovery of damage for fraud, if brought to judgment in favor of the plaintiff, would destroy the prior judgment. There is no civil action for perjury or the use of false documents. Additional allegation of conspiracy adds nothing." *Netchi v. Bernard,* 167 N.Y.S. 2d 89 (Hecht, J.).

AWARD FORBIDDING SUPERVISORY EMPLOYEES TO PERFORM MANUAL WORK WAS VACATED, the court holding that this exceeded the arbitrator's authority under a contract which did not permit him "to add to, subtract from, alter or amend the collective bargaining agreement." *Los Angeles Drug Co. v. Warehouse Workers Union, Local 26,* 29 LA 370 (California Super Ct., Los Angeles County, Rhone, J.).

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